PUBLIC PROSECUTOR

v.

LAI KON CHING & ANOR.

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK B. HJ. ISHAK JC
[CRIMINAL TRIAL NO. PCT 58-2-93]
5 SEPTEMBER 1994

EVIDENCE: Statements made or recorded in the course of police investigations by agent provocateur - Offence of trafficking in dangerous drugs - Defence application for the police detective corporal who acted as agent provocateur to produce report in present file, detective journal and pocket book - Whether defence entitled to copies of statements and those documents - Impeaching credit of witness - Evidence Act 1950 - Sections 35, 145 and 155(a) - Whether defence attempting to circumvent provisions of s. 40A Dangerous Drugs Act 1952 - On scrutiny of report prepared by agent provocateur, defence found no material to contradict evidence - Whether defence can refuse to mark report as a defence exhibit - Passages underlined in red by defence on the report ordered to be marked as a defence exhibit.

In this case during the testimony of the prosecution's witness, an *agent provocateur*, defence Counsel made an application for this witness to produce:

(a) the report which he made and put in the project file in respect of the events that occurred on 25 March 1992;

(b) his detective journal; and

(c) his pocket book.

The question that arose was this: Once the documents are supplied, must the defence tender and mark those documents as defence exhibits, to show that it was put in at the behest of the defence and not by the prosecution?

Held:

The portions underlined in red by the defence in the report prepared by Detective Corporal Busra who acted as an *agent provocateur* was ordered to be marked as a defence exhibit. The other parts of the report was ordered not to be relied upon by the prosecution, the defence and also by the Court in determining the guilt or innocence of the accused persons.

[Order accordingly].

Cases referred to:
Tara Singh & Ors. v. PP [1949] MLJ 110 ***(refd)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(refd)***
Rex v. Low Toh Cheng [1941] MLJ 1 ***(refd)***
PP v. Ku Lip See [1981] 1 MLJ 258 ***(refd)***
Husdi v. Public Prosecutor [1980] 2 MLJ 80 ***(refd)***
Dato' Mokhtar bin Hashim v. Public Prosecutor [1983] 2 MLJ 232 [1983] 2 CLJ 10 ***(refd)***
Public Prosecutor v. Paneerselvan & Ors. [1991] 1 MLJ 106 [1990] 2 CLJ 833 ***(refd)***
Mohamed Noor bin Othman & Ors. v. Mohamed Ismail bin Haji Ibrahim [1988] 3 MLJ 82 [1988] 2 CLJ 597 ***(refd)***

Birad Mal Singhvi v. Anand Purohit [1988] AIR SC 1796 ***(refd)***
Sant Ram v. Sital Das [1952] AIR Punj. 301 ***(refd)***
Yusoff bin Sidin v. Public Prosecutor [1971] 1 MLJ 203 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 40A
Evidence Act 1950, ss. 35, 145(1), 155(c), 157

Other sources referred to:
Sarkar's Law of Evidence, Vol. 2, p. 2041

For the public prosecutor - Murtazadi Amran, DPP
For the 1st accused - Gurbachan Singh (Jula Singh with him); M/s. Bachan & Kartar & M/s. Paramjit & Co.
For the 2nd accused - Kumaraendran (Jula Singh with him); M/s. Kumar, Sitham & Co. & M/s. Paramjit & Co.

JUDGMENT

Hj. Abdul Malik b. Hj. Ishak JC:
As an *agent provocateur*, Detective Corporal 70718 Busra bin Abdul Kadir (SP7) ("Busra") was introduced by ASP Badaruddin bin Zafari (SP5) ("Badaruddin") to an informer who in turn was supposed to introduce Busra to a drug syndicate that operated in the area of Salak, Sungai Siput.

A meeting ("the first meeting") was arranged by the informer and on 25 March 1992, Busra was introduced by the informer to the first accused at about 6.45 p.m. at the Mardec latex collection hut. Discussions were then held between Busra and the first accused and this resulted in the purchase of five (5) packets of ganja for RM25 by Busra. These meetings and discussions were subsequently relayed to Badaruddin by Busra, the latter also handed those five (5) packets of ganja to Badaruddin.

The second meeting arose out of a telephone conversation between Busra and the first accused (it was in evidence that the first accused gave Busra his telephone contact number during the first meeting) and the time was scheduled at 5.00 p.m. on 2 May 1992 at the Mardec latex collection hut where the first accused promised to sell 300 packets of ganja at RM1,500 to Busra. At this second meeting, the first accused introduced the second accused to Busra and it was the second accused that carried the 300 packets of ganja. Eventually, the first accused passed the 300 packets of ganja to Busra who paid for the same at RM1,500. Later, upon counting the amount it was discovered that only 290 packets of ganja were transacted. The details of the second meeting and the discussions which Busra had with both the accused were amply set out in the notes of evidence and for this exercise it would be sufficient to mention that Busra briefed Badaruddin about that second encounter and also handed the ganja to Badaruddin.

The third and final encounter was the ultimate encounter that led to the arrest of both the accused. This was on 5 May 1992 at about 11.00 p.m. where 2,000 packets of ganja in a black bag was seized from the car driven by the first accused. At this final encounter, an ex-detective Constable 70727 Chan Kok Wah ("Chan") also acted as an *agent provocateur* and he played the role of the "taukeh".

Mr. Gurbachan Singh for the first accused launched a thorough and concerted cross-examination of Busra, sometimes bordering on intimidation. I do not propose to touch on the demeanour of Busra at this juncture. Suffice for me to say that for good measure,

a Judge sitting alone as a fact-finder is entitled to observe and record the demeanour of any witness whilst giving evidence. But, of course, an impression as to the demeanour of any particular witness ought not to be adopted without testing it against the whole of the evidence of that witness in question (see *Tara Singh & Ors. v. PP* [1949] MLJ 110, *Tengku Mahmood v. PP* [1974] 1 MLJ 110, *Rex v. Low Toh Cheng* [1941] MLJ 1 and *PP v. Ku Lip See* [1981] 1 MLJ 258).

Be that as it may, Mr. Gurbachan Singh made an application for Busra to produce:

(1) the report which be made and put in the project file in respect of the events that occurred on 25 March 1992;

(2) his detective journal; and

(3) his pocket book

for the sole purpose of ascertaining what the defence had specifically and repeatedly put and which was repeatedly denied by Busra.

Busra was cross-examined on the following points:

(a) that on 25 March 1992, he met another Chinese person other than the first and the second accused;

(b) that that Chinese person rode a motorcycle bearing registration number AP 4523 when they both met on 25 March 1992;

(c) that motorcar ABP 4610 purportedly driven by the first accused was not there and, consequently, not seen by him (Busra);

(d) that the motorcar ABP 4610 was not recorded as having been seen on 25 March 1992 in the report that was kept in the project file;

(e) that on 25 March 1992, he met a male Chinese by the name of Chong Wai Kheong;

(f) that on 25 March 1992 he met four persons and not merely the first accused;

(g) that it was Chong Wai Kheong that handed the five (5) packets of ganja to him on 25 March 1992;

(h) that someone by the name of Jepun was present on 25 March 1992;

(i) that Busra failed to arrest Chong Wai Kheong on 25 May 1992 and, consequently, Chong Wai Kheong's role was entirely left out by Busra;

(j) that he handed RM25 to Chong Wai Kheong on 25 March 1992 and not to the first accused;

(k) that the informer introduced Busra to Chong Wai Kheong on 25 March 1992;

(l) that Busra discussed with Chong Wai Kheong and not the first accused;

(m) that what was narrated by Busra for the events that purportedly took place on 25 May 1992 never really took place;

(n) that on 25 May 1992, the discussions and the handing over of the drugs were between Chong Wai Kheong and Busra; and

(o) that at the scene the police fired shots because Chong Wai Kheong fled from the

scene.

It was argued that the three documents requested for would enable the defence to impeach the credit of Busra under s. 145(1) of the Evidence Act 1950. It was contended that the defence was entitled to those three documents.

Section 145(1) of the Evidence Act 1950 reads thus:

> A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Towards this end, s. 155 (c) of the Evidence Act 1950 is also relevant. That section reads as follows:

> The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the Court, by the party who calls him:
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

These sections would certainly allow great latitude to the defence to seek out those documents and impeach the credit of Busra. In relation to a police statement sought by the defence in order to impeach the credit of a prosecution witness (this is not the case here), his Lordship Suffian LP (as he then was) in *Husdi v. Public Prosecutor* [1980] 2 MLJ 80 FC had this to say:

> ...when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the Court, should, on the request of the defence, refer to his police statement and may then, if the Court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.

The learned Deputy Public Prosecutor strenuously objected and argued that the report was prepared by Busra on 26 March 1992 as an *agent provocateur* and kept in the project file labelled as "Rahsia Besar." Such labelling would prevent that report from being tendered as evidence. It was also argued that Busra denied writing anything in his pocket book in relation to his role in this case and, consequently, that pocket book should not be produced for inspection by the defence. Busra, on his part, gave a rather cogent reason for not writing in his pocket book. He said that his pocket book would be read by his superiors and since his project was "rahsia" he purposely avoided recording his activities in the pocket book but instead prepared a detailed account to be kept in the project file. In regard to the detective journal, Busra admitted recording the date, time and on whose instructions he acted as an *agent provocateur* therein. Having referred to the evidence of Busra, the learned Deputy Public Prosecutor then argued that the defence application was nothing but a mere hunch unsupported by evidence. To this, the defence countered and submitted that they have given the reasons and laid the foundations while cross-examining Busra for the production of those documents (see the judgment of Abdoolcader FJ (as he then was) in *Dato' Mokhtar bin Hashim v. Public Prosecutor* [1983] 2 MLJ 232 FC at page 276 left hand column between G to H).

The defence further cited and relied upon *Public Prosecutor v. Paneerselvan & Ors.* [1991] 1 MLJ 106 where his Lordship Edgar Joseph Jr. J. (as he then was and now a

Federal Court Judge) allowed the prosecution to tender certain statements which took the form of entries in 14 pages torn from an exercise book and corresponding entries in summary form, in a pocket note book for the purpose of corroboration under s. 157 of the Evidence Act 1950 of the evidence of an undercover agent and argued, like wise, that this Court should do the same and admit those documents to enable the defence to impeach the credit of Busra.

With respect, the defence forgot to mention that in *Paneerselvan*, his Lordship at the end of the day discounted totally those documents as corroboration under s. 157 of the Evidence Act 1950 since his Lordship was of the opinion that out of Court statements had trifling weight and had considerable prejudicial effect.

In my considered view, the defence in attempting to have those documents produced through Busra sought to circumvent the provisions of s. 40A of Dangerous Drugs Act 1952 ("the Act") by wanting to challenge the credit worthiness of Busra, the *agent provocateur* in this case. The learned Deputy Public Prosecutor's worry was well founded; he must have feared that if this Court were to allow the defence application it would mean opening the floodgate and, consequently, watering down the provisions of s. 40A of the Act.

The answer to the problem seems to me to hinge onto s. 35 of the Evidence Act 1950 which would classify those documents held by Busra to be public documents made by Busra in his capacity as a public servant in the discharge of his official duty. Such documents would certainly be relevant to ascertain whether the allegations of the defence set out in the early part of this judgment were true or otherwise. The Supreme Court in *Mohamed Noor bin Othman & Ors. v. Mohamed Ismail bin Haji Ibrahim* [1988] 3 MLJ 82 had succinctly stated that:

> For it is trite law that where the words of a statute are clear there is no room for the Court to go beyond the expressed language of the statute.

Section 35 of the Evidence Act 1950 reads thus:

> An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

In my considered view, to render a document admissible under this section, three conditions must be satisfied. Firstly, the entry that is relied upon must be one recorded in any public or other official book, register or record. Secondly, it must be an entry stating a fact in issue or a relevant fact. Thirdly, it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by the law (*Birad Mal Singhvi v. Anand Purohit* [1988] AIR SC 1976 at page 1907). The explicit wording of this section conveys the idea of a duty imposed upon the maker of the entry by law or by virtue of his official position, to record the information he possesses or has gathered in an official document. It also conveys the notion that the entry will be of a permanent nature thereby excluding all entries which are merely of an ephemeral character. In short, the law gives such a confidence to public officers that it presumes that they will discharge their several trusts with accuracy and fidelity (*Sant Ram v. Sital Das* [1952] AIR Punj. 301).

But, I hasten to add that the admissibility of a document must not be confused with its probative value. Put in another way, admissibility of a document is one thing, its

probative value is quite another - both these two cannot be combined together. For instance, a document may be admissible and at the same time it may not carry any weight or its probative value may be practically zero. However, where a report is prepared by a responsible officer which is based on evidence of witnesses and has a statutory flavour in that it is given not merely by a responsible officer but under the authority of a statute, its probative value would indeed be very high as to entitle it to great weight.

It is quite obvious that Busra prepared those documents in his official capacity as envisaged under s. 35 of the Evidence Act 1950 and those entries have very high probative value.

In the interest of justice, this Court is interested to know if Busra has departed significantly from those documents sought for by the defence. The defence is entitled to resort to ss. 145(1) and 155(c) of the Evidence Act 1950 to impeach the credit of Busra by means of those documents. Accordingly, I accede to the defence application and order that those documents be produced by the prosecution for scrutiny of this Court. The prosecution was also directed to supply the defence with those documents. Once supplied, the question that arises would be this: must the defence tender and mark those documents as defence exhibits, to show that it was put in at the behest of the defence and not by prosecution? Herein, lies the danger. Those documents may or may not be beneficial to the defence. If beneficial everything will be all right. If not, the defence must shoulder the responsibility for their own folly; they cannot blow hot and cold at the same time. This stern warning should put the defence, in like situation in the future, to be more wary when making an application of this nature. Be that as it may, I am now told by the learned Deputy Public Prosecutor and confirmed by Busra under re-examination that the pocket book and the detective journal had gone missing when the CAD Ipoh, Perak moved office. It was beyond their control. Only the report prepared by Busra and kept in the project file was available and this was, accordingly, made available to the Court and the defence. Upon scrutiny of the report prepared by Busra and kept in the project file, the defence found no material to contradict Busra and refused to mark that report as a defence exhibit, much to the chagrin of the learned Deputy Public Prosecutor. I have since perused through the report prepared by Busra and found nothing therein which could be used to contradict Busra. Though the defence refused to mark the report as a defence exhibit yet they mounted an extensive cross-examination of Busra on the report - a course of action which provoked vehement objections by the learned Deputy Public Prosecutor. I share the views of the learned Deputy Public Prosecutor and direct that particular passages underlined in red by the defence on the report prepared by Busra should be marked as a defence exhibit. In this context, I am guided by passages appearing in the judgment of the late Sharma J. in *Yusoff bin Sidin v. Public Prosecutor* [1971] 1 MLJ 203 where his Lordship said:

> A prosecution or defence witness cannot be merely asked whether he made a previous statement to the contrary to the investigating officer and the matter left there. That answer of the witness cannot be used as evidence. The only way in which the previous statement can be used is by contradicting the witness by such writing and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction. Those parts of the statement which are used for contradicting the witness must be proved and brought on record. Where, however, there is no direct contradiction between what is said to the police and what is said in Court and the contradiction consists only in an omission, the said omission can be proved by bringing on record the whole of the statement given in Court.

In another part of the judgment, the late Sharma J. said:

> Other parts of the statement cannot be relied upon by either the prosecution or the defence in determining the guilt or innocence of the accused and should not be relied upon by the Court.

In **Sarkar's Law of Evidence**, volume 2 at page 2041, the following passage appears:

> Only those passages in the previous statements should be proved, which clearly contradict some portion of the testimony of the witness before the Court. The whole of the depositions should not be put in without marking the particular passages upon which reliance is placed for purpose of contradiction (*R v. Ajit* A [1945] C 159; *A.H. Abdulla v. State of Kerala* [1981] Cr. LJ NOC 55: ILR [1981] 1 Ker 508; *Kaveri Venkteswarlu v. State of AP* [1981] Cr. LJ NOC 133 (AP); *Annasaheb Melappa Pattanshetty v. State of Karnataka* [1982] Cr. LJ 1553, 1556: [1982] 1 Kant LJ 433: [1982] Cr. LR (Guj) 433 (Kant); *Kehar Singh v. State* A [1988] SC 1883, 1901: [1989] Cr. LJ 1; *Puthenthara Mohanan v. State of Kerala* [1990] Cr. LJ 1059, 1064 (Ker); *Thankappan Mohanan v. State of Kerala* [1990] Cr. LJ 1477, 1482 (Ker)).

Applying the principles set out above, only the underlined portions in red in the report prepared by Busra to be marked as a defence exhibit. The other parts of the report should not be relied upon by the prosecution, the defence and also by the Court in determining the guilt or innocence of the accused persons.